STATE OF MICHIGAN

COURT OF APPEALS

RONALD W. LECH, II,

Plaintiff/Counter Defendant-Appellant,

v

HUNTMORE ESTATES CONDOMINIUM ASSOCIATION,

Defendant/Counter Plaintiff,

and

JACOBSON ONE CREEK LAND DEVELOPMENT, L.L.C., and SCOTT R. JACOBSON, d/b/a S.R. JACOBSON LAND DEVELOPMENT, L.L.C.,

Defendants-Appellees.

UNPUBLISHED
August 6, 2013

No. 297196
Livingston Circuit Court
LC No. 08-024045-CH

ON REMAND

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

This case returns to this Court on remand from the Supreme Court. On remand, we must consider whether the trial court properly assessed sanctions under MCR 2.405 against plaintiff. For the reasons set forth below, we affirm the trial court's assessment of sanctions. However, we vacate the attorney fee portion of the sanction award and remand for recalculation consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

In December, 2008, plaintiff commenced this action, alleging common law and statutory slander of title, violations of the condominium act, and tortious interference with contractual and business expectancies. In Docket No. 296489, which is no longer before us, the trial court granted summary disposition in favor of defendants on the substantive claims. In Docket

No. 297196, the trial court ordered that plaintiff pay $40,878.50 in costs and attorney fees to the Jacobson defendants as a sanction for plaintiff's rejection of defendants' offer to stipulate to entry of judgment pursuant to MCR 2.405.

Plaintiff appealed, challenging both the trial court's grant of summary disposition as well as the sanction award. The two appeals were consolidated. This Court reversed the trial court's decision to grant summary disposition, and vacated the sanction award, reasoning that because summary disposition was improperly granted, it followed that the sanction award must be vacated.

The Jacobson defendants sought leave to appeal to the Supreme Court. In lieu of granting leave, the Court reversed this Court's decision with regard to the Jacobson defendants' summary disposition motion, reinstating the trial court's order granting their motion. *Lech v Huntmore Estates Condominium Ass'n*, 491 Mich 937; 815 NW2d 127 (2011). The Supreme Court was silent, however, with regard to the sanctions award under MCR 2.405. Consequently, the Supreme Court's disposition effectively revived plaintiff's issues on appeal regarding the sanction award, but left them undecided. The Supreme Court therefore issued another order, modifying its earlier order to "REMAND this case to the Court of Appeals for reconsideration in Court of Appeals Docket No. 297196." *Lech v Huntmore Estates Condominium Ass'n*, 493 Mich 921; 823 NW2d 567 (2012). This Court granted plaintiff's motion for supplemental briefing and received briefs from both plaintiff and the Jacobson defendants. This Court subsequently issued an order to deconsolidate the cases. *Lech v Huntmore Estates Condominium Ass'n*, unpublished order of the Court of Appeals, entered February 25, 2013 (Docket Nos. 296489, 297196).

II. ANALYSIS

Plaintiff challenges the sanction award, arguing that the request for sanctions was untimely and that some of the costs and fees included in the award were improper because they related to proceedings other than those resulting from plaintiff's refusal to stipulate to the offer of judgment. Alternatively, plaintiff argues that the attorney fees were improperly calculated because the trial court began its calculation from the wrong date. We agree with plaintiff only with regard to the date of calculation, and remand to the trial court on that issue alone. In all other respects, we disagree with plaintiff and affirm.

A trial court's decision on a motion for costs under MCR 2.405 is reviewed for an abuse of discretion. See *Knue v Smith*, 478 Mich 88; 731 NW2d 686 (2007). However, a court "by definition abuses its discretion when it makes an error of law." *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996).

MCR 2.405(A)-(C) set forth procedures through which a party may offer to stipulate to entry of judgment for all or part of a claim, and through which a party may accept or reject such an offer. MCR 2.405(D)(1) authorizes the imposition of costs when such an offer is rejected and "the adjusted verdict is more favorable to the offeror than the average offer. . . ." Additionally, "[a] request for costs [under MCR 2.405(D)] must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment." MCR 2.405(D).

There is no dispute that plaintiff rejected through inaction an offer from the Jacobson defendants to stipulate to entry of judgment; that plaintiff suffered a verdict more favorable to those defendants than their offer had provided; that the trial court entered its order granting the Jacobson defendants summary disposition on October 13, 2009, after which plaintiff filed a motion for reconsideration which was denied on January 27, 2010; and that the Jacobson defendants filed their request for costs and fees on January 4, 2010, which was while the motion for reconsideration was pending.

Plaintiff notes that more than 28 days passed between the trial court's October 13, 2009 decision granting summary disposition to the Jacobson defendants and their January 4, 2010 motion for costs. Accordingly, plaintiff argues that the request for sanctions was untimely under MCR 2.405(D). The Jacobson defendants argue that their motion for reconsideration constituted a motion to set aside the judgment for purposes of triggering the 28-day countdown under MCR 2.405(D), and that, because their request for costs in fact preceded the decision on the motion for reconsideration, their request was timely. We agree with the Jacobson defendants.

Plaintiff argues, with regard to the timeliness of the request for sanctions, that a motion for reconsideration under MCR 2.119(f) is insufficient to toll the 28-day filing deadline because motions for reconsideration are not motions for a new trial or to set aside the judgment. MCR 2.405(D). Plaintiff argues that only motions under MCR 2.611 (motions for a new trial) or MCR 2.610 (set aside the judgment) are sufficient to toll the filing deadline. However, contrary to plaintiff's argument, motions under MCR 2.610 and 2.611 are two of many ways by which a party may move a court to set aside a judgment. Others include MCR 2.603(D) (setting aside default judgment), MCR 2.612 (relief from judgment), and, indeed, MCR 2.119(F) (motions for reconsideration). Because the court rules provide for several avenues through which a party may move a trial court to set aside a judgment, we reject plaintiff's suggestion that only motions for judgment notwithstanding the verdict or for a new trial should have that effect for purposes of determining timeliness for purposes of MCR 2.405(D)(5).

Although we have located no authority specifically stating whether a motion for reconsideration qualifies as a motion to set aside the judgment for purposes of tolling the filing deadline in MCR 2.405(D)(5), instructive is that this Court has so treated a motion for reconsideration for purposes of case evaluation sanctions. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 285; 807 NW2d 405 (2011). In *MEEMIC*, this Court held that "a motion for reconsideration corresponds to a motion for a new trial or to set aside a judgment." *Id*. Plaintiff insists that *MEEMIC* was wrongly decided, and alternatively argues that *MEEMIC* is not directly on point because it concerned case-evaluation sanctions, not costs resulting from a failure to stipulate to entry of judgment. We disagree. Although *MEEMIC* addressed case evaluation sanctions under MCR 2.403, and not sanctions under MCR 2.405, each rule contains identical language with regard to filing deadlines. Compare MCR 2.405(D)(5), with MCR 2.403(O)(8). Indeed, this Court has previously recognized that "the pertinent language [related to filing deadlines] in the two rules is identical, and the rules should be interpreted consistently with each other." *Kopf v Bolser*, 286 Mich App 425, 432; 780 NW2d 315 (2009) (citation omitted). Accordingly, we conclude that *MEEMIC* is persuasive, and that a motion for reconsideration can be a motion to set aside the judgment for the purpose of tolling the deadline in MCR 2.405(D)(5). Because defendant's motion for sanctions occurred within 28 days of the trial court's order denying the motion for reconsideration, it was timely.

Next, plaintiff argues that the trial court erred for not having limited the award to costs incurred after the case was dismissed, or, alternatively, that the award should at least have excluded costs connected with the motion for costs itself. We disagree.

Attorney fees subject to shifting under MCR 2.405 should be limited to those necessitated by the rejection of the offer to stipulate to entry of judgment, which calls for examination of the rejecting party's claims and theories. *Castillo v Exclusive Builders, Inc*, 273 Mich App 489, 493-494; 733 NW2d 62 (2007). Instructive is this Court's determination, in the context of an award of costs necessitated by a party's rejection of a case-evaluation award, that the governing court rule did not limit its reach to services performed at trial, but instead covered "*all* services necessitated by the rejection of the mediation award," which in that case included post-judgment motions and an evidentiary hearing. *Troyanowski v Village of Kent City*, 175 Mich App 217, 227; 437 NW2d 266 (1988) (citing MCR 2.403).

MCR 2.405(A)(6), in defining "actual costs" to include "a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment," likewise does not limit its scope to services performed at trial. Just as plaintiff's refusal to stipulate to judgment caused the Jacobson defendants to continue litigating through vindication on summary disposition, his motion for reconsideration threw that vindication into doubt until successfully resisted, and so attorney fees invested in defending that motion were likewise necessitated by that initial refusal to stipulate.

Moreover, given that "[a] lawyer has an ethical duty to serve the client zealously," *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 538; 599 NW2d 493 (1999), there was nothing extraneous about defendants' attorney's efforts to obtain for his clients the benefits of MCR 2.405(D)(1)'s provisions for a party whose offer to stipulate to entry of judgment is rejected but then ends up with a verdict more favorable than what the offer provided. Such post-trial litigation in this case should be deemed the direct and necessary result of plaintiff's failure to stipulate to the entry of judgment.

In his supplemental brief, plaintiff asserts that defendants' request for fees included those "improperly . . . relating to secretarial and non-legal personnel," and that the trial court rejected a claim for fees based on frivolousness, and argues that because defendants have thus been determined to have overreached, not all their legal fees in litigating the issue of costs should be deemed to have been necessitated by plaintiff's rejection of the offer of judgment. However, plaintiff cites no authority for the proposition that attorney fees subject to shifting as the result of rejection of an offer of judgment are limited to those expended in presenting *successful* arguments to the trial court. The matter was properly and necessarily litigated, and so defendants, along with plaintiff, put forward various plausible arguments, not all of them successful.

Finally, plaintiff argues that MCR 2.405(C)(2) provides that a party may reject an offer to stipulate to judgment by expressly doing so in writing, or by declining to accept within the 21 days specified by MCR 2.405(C)(1). MCR 2.405(D)(1) authorizes the imposition of "actual costs incurred in the prosecution or defense of the action" when an offer to stipulate to judgment is rejected and the adjusted verdict is more favorable to the offeror than the average offer. . . ." MCR 2.405(A)(6) defines "actual costs" as "the costs and fees taxable in a civil action and a

reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment." MCR 2.405(D)(3) instructs the trial court to determine actual costs, but authorizes the court to exercise discretion over whether to include attorney fees. Accordingly, when an award of costs is proper under MCR 2.405(D), the shifting of taxable court costs is mandatory, but the shifting of attorney fees is discretionary. *Castillo* 273 Mich App at 492.

On appeal, plaintiff argues that the offer was open and pending until it was rejected, which in this instance happened by way of the 21-day provision of MCR 2.405(C)(2)(b), and thus that defendants bore no attorney fees connected with that rejection until those 21 days had passed. We agree. The rules governing offers to stipulate to judgment exist to expedite litigation, but do so not only in connection with the party making the offer, but also in connection with the party receiving the offer. Both must act, including potentially an offeree's rejection through inaction, before the issue of sanctions arises.

In the instant case, there was no failure to accept the offer until one of the avenues for rejecting the offer became operative, in this case the passage of 21 days. The applicable rules govern offer and acceptance or rejection, with no differentiation between rejection by passage of time during which the offeree struggled in good faith to decide what to do with the offer and rejection by willful disregard of the offer. Sanctions for failure to accept the offer are thus properly calculated from the moment the rejection becomes operative, regardless how the rejection was effected.

For these reasons, we conclude that the attorney fees resulting from the failure to accept an offer to stipulate to entry of judgment should be calculated from the moment that this failure has come into play, meaning that when a bona fide rejection under MCR 2.405(C)(2) has become effective. Accordingly, we vacate the award of attorney fees and remand this case to the trial court with instructions to recalculate it from the moment of rejection. In all other respects, we affirm the trial court.

Affirmed in part and remanded to the trial court for further proceedings consistent with the opinion. We do not retain jurisdiction. No costs, as neither party prevailed in full. See MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens